IF A BEAR SHITS IN A SEALED CIPA CONFERENCE, CAN IT EXPAND THE ESPIONAGE ACT TO THE NYT'S READERS?

On May 3, 2022, Judge Jesse Furman posed two hypotheticals to prosecutors in the Joshua Schulte case about whether the Espionage Act would apply to people who disseminated already public information from the Vault 7/Vault 8 leaks: First, a member of the public, having downloaded publicly-posted CIA hacking materials made available by WikiLeaks, who gave those materials to a third party. Second, someone who passed on information from the Vault 7/8 leaks published by the NYT to a third party. In both cases, the government argued that someone passing on already public information from the leaked files could be guilty of violating the Espionage Act.

At least, it *appears* that the government argued for this expansive hypothetical application of the Espionage Act, based on what Furman said in a discussion about jury instructions on July 6. I've put a longer excerpt of the exchange from the discussion about jury instructions below; here's how Judge Furman instructed the jury on the matter.

The actual discussion in May took place in a hearing conducted as part of the Classified Information Procedures Act, CIPA, the hearings during which the government and defense argue about what kind of classified information must be declassified for trial (I wrote more about CIPA in this post). Because the discussion happened as part of the CIPA process, the hearing itself is currently sealed.

And the government wants it to stay that way.

Both in a letter motion filed on November 11, postured as an update on the classification review of the transcripts of that hearing, and in a December 5 letter motion Furman ordered the government to file formally asking to keep the transcripts sealed, the government argued that CIPA trumps the public's right of access to such court records.

> CIPA's mandatory sealing of the records of in camera proceedings conducted pursuant to Section 6 supersedes any common law right of access to those records, and neither history, logic, nor the right of attendance at proceedings support a right of access under the First Amendment.

The earlier letter even explained why it wanted to keep the "extensive colloquies" in these hearings sealed.

> Beyond that, the extensive colloquies and the specific issues of law discussed at that hearing would reveal, by itself, the specific type of relief sought by the parties on specific subjects, which would in turn provide significant indications about what classified information was at issue, prompting undue speculation that would undermine national security interests.

But this specific issue of law, whether journalists or their readers have legal exposure under the Espionage Act for reporting on leaked, classified material, is not secret. Nor should it be.

That's why, with the support of National Security Counselors' Kel McClanahan, I'm intervening in the case to oppose the government's bid to keep the May 3 and other transcripts sealed. *How* the government applies the Espionage Act to people who haven't entered into a Non-Disclosure Agreement with the

government to keep those secrets has been a pressing issue for years, made all the more so by the prosecution of Julian Assange. Indeed, the government may have given the answers to Judge Furman's hypotheticals that they did partly to protect the basis of the Assange prosecution. But for the same reason that the Assange prosecution is a dangerous precedent, the prosecutors' claims — made in a sealed hearing — that they could charge people who share a NYT article (or an emptywheel post) on the Vault 7 releases raise real Constitutional concerns. As Judge Furman noted, "there are hundreds of thousands of people unwittingly violating the Espionage Act by sharing the New York Times report about the WikiLeaks leak" (and, though he doesn't say it, tens of thousands sharing the emptywheel reporting about it). And yet no one will learn that fact if the discussion about it remains sealed.

I'm not usually able to intervene in such matters because I don't have the resources of a big media in-house counsel to do so. McClanahan's willingness to help makes that possible. National Security Counselors are experts on this kind of national security law, with extensive experience both on the Espionage Act and on CIPA. But the group relies heavily on tax-exempt charitable contributions to be able to do this kind of work. Please consider supporting the effort with a donation via this link or PayPal. Thanks!

Transcript excerpt

These transcripts were obtained by the Calyx Institute with funding from Wau Holland, the latter of which has close ties to WikiLeaks.

> So that's the context and a little bit of the background. I think I have frankly come around to thinking that for reasons and constitutional avoidance and otherwise that there is a lot to — that Mr. Schulte is not entirely correct but is substantially correct, that is to say

> that if all – let me put it differently. I think the reason that Mr. Schulte is in a different position with respect to the MCC counts is that he is someone in a position to know whether the information was classified, was NDI, was CIA information and in that sense by virtue of leaking it again, so to speak, he is providing official confirmation but it is the official confirmation that is the new information that would qualify as NDI and I think Rosen kind of highlights that, that particular nuance. I think that distinguishes Mr. Schulte from – I gave you a hypothetical, again, I think it is currently in the classified hearing and therefore not yet public, but I gave you two hypotheticals. I think **one is where a member of the public goes on WikiLeaks today and downloads Vault 7 and Vault 8 and then provides the hard dive with the download to someone who is not authorized to receive NDI, and I posed the question of whether that person would be guilty of violating the Espionage Act and I think your answer was yes**. That strikes me as a very bold, kind of striking proposition because in that instance, if the person is not in a position to know whether it is actual classified information, actual government information, accurate information, etc., simply providing something that's already public to another person doesn't strike me as – I mean, strikes me as, number one, would be sort of surprising if that qualified as a criminal act. But, to the extent that the statute could be construed to the extend to that act one would think that there might be serious constitutional problems with it.
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> **I also posed the hypothetical of the New York Times is publishing something that appears in the leak and somebody sharing**

> **that article in the New York Times with someone else. That would be a crime and there, too, I think you said it might well be violation of the law**. I think to the extent that that would extend to the New York Times reporter for reporting on what is in the leak, or to the extent that it would extend to someone who is not in position to know or position to confirm, that raises serious constitutional doubts in my mind. That, to me, is distinguishable from somebody who is in a position to know. I think there is a distinction if that person transmits a New York Times article containing classified information and in that transmission does something that confirms that that information is accurate — right — or reliable or government information, then that's confirmation, it strikes me, as NDI. But it just strikes me as a very bold and kind of striking proposition to say that somebody, who is not in position to know or does not act in a way that would confirm the authenticity or reliability of that information by sharing a New York Times article, could be violating the Espionage Act. That strikes me as a kind of striking proposition.
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> So all of which is to say I think I have come around to the view that merely sharing something that is already in the public domain probably can't support a conviction under this provision except that if the sharing of it provides something new, namely, confirmation that it is reliable, confirmation that it is CIA information, confirmation that it is legitimate bona fide national defense information, then that confirmation is, itself, or can, itself, be NDI. I otherwise think that we are just in a terrain where, literally, **there are hundreds of thousands of people unwittingly violating the Espionage Act**

by sharing the New York Times report about the WikiLeaks leak.

MR. DENTON: So, your Honor, I think there is a couple of different issues there and one of them is sort of whether the question that you are posing right now is actually the right question for this moment in time when we are talking about the elements of the offense.

In the context of that earlier discussion, and I will repeat it here, I think one of the things that we emphasized is there is a difference between whether a set of conduct, either the hypotheticals that you describe would satisfy the elements of a violation of 793 as opposed to the separate question of whether a person or an organization in that context would have a well-taken, as-applied First Amendment challenge to the application of the statute to them in that context.

THE COURT: But I have to say – and I recognize this may be in tension with my prior holding on this issue – the First Amendment is an area where somebody – I mean, the overbreadth doctrine in the First Amendment context allows somebody, as to whom a statute could be applied, constitutionally to challenge the statute on the grounds that it does cover conduct that would violate the First Amendment. So in that regard, it is distinct from a vagueness challenge. I think to the extent that you are saying that in those instances – I mean, the reason being that the First Amendment embodies a concept of chilling. If a New York Times reporter doesn't know whether he is violating the Espionage Act by repeating what is in the WikiLeaks leak notwithstanding the fact that there is serious public interest in it, it may chill the

> suppression and that suppression is protected by the First Amendment. That’s the point in the overbreadth doctrine.
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> Go ahead.